UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

URSULA CATHERINE SCHIEVE,	)	
	)	
Plaintiff	)	
	)	
v.	)	*Docket No. 98-215-P-H*
	)	
DANA W. CHILDS, ESQ., et al.,	)	
	)	
Defendants	)	

RECOMMENDED DECISION ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM DECISION ON PLAINTIFF'S MOTION TO STRIKE

The defendants, attorney Dana W. Childs, and his law firm, Childs, Emerson, Rundlett, Fifield & Childs, move for summary judgment in this action alleging legal malpractice. The plaintiff moves to strike the affidavit of an expert witness submitted by the defendants in support of their motion. I deny the motion to strike and recommend that the court grant the motion for summary judgment.

I. The Motion to Strike

The plaintiff asks the court to strike the affidavit of Mary Najarian, a retired lawyer identified by the defendants as an expert witness, Affidavit of Mary Najarian ("Najarian Aff.") (Docket No. 11) ¶¶ 2-3, submitted by the defendants in support of their motion for summary judgment. The plaintiff contends that the affidavit is fatally insufficient because it contains no jurat and because it

presents only Ms. Najarian's opinions. Motion . . . to Strike Affidavit of Mary Najarian ("Motion to Strike") (Docket No. 19) at 1. She relies on *Casas Office Mach., Inc. v. Mita Copystar Am., Inc.*, 42 F.3d 668, 681 (1st Cir. 1994), to support her argument that the affiant "offers no foundation for her testimony," Motion to Strike at 3, as an additional reason why the affidavit should not be considered by the court.

Contrary to the plaintiff's argument, the absence of a jurat is not necessarily a fatal flaw in an affidavit submitted pursuant to Fed. R. Civ. P. 56 in support of a motion for summary judgment. The final two lines of the affidavit in question provide: "Dated: November 14, 1998 / I declare under penalty of perjury that the foregoing is true and correct." Najarian Aff. at 2. These lines are followed by Najarian's signature. The defendants correctly point out that this is sufficient under 28 U.S.C. § 1746, which provides, in pertinent part:

> Whenever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:
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> * * *
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> **(2)** If executed within the United States . . .: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).
>
> (Signature)"

The Najarian affidavit conforms to this statutory requirement. Nothing further is necessary. *Goldman, Antonetti, Ferraiuoli, Axtmayer & Hertell v. Medfit Int'l, Inc.*, 982 F.2d 686, 689 (1st Cir.

1993).

The affidavit of an expert witness submitted in support of a motion for summary judgment is permitted to include statements of opinion. *See, e.g., Vadala v. Teledyne Indus., Inc.*, 44 F.3d 36, 38 (1st Cir. 1995); *Hayes v. Douglas Dynamics, Inc.*, 8 F.3d 88, 92 (1st Cir. 1993). Indeed, it is difficult to conceive of expert testimony that would not include opinions.

Finally, the affidavit provides sufficient foundation for Najarian's opinions. It recites, *inter alia*, that she advised the Maine Department of Human Services concerning the Uniform Reciprocal Enforcement of Support Act (URESA) from 1988 to 1995 in her capacity as an assistant attorney general and represented the Department in court on issues concerning URESA. Najarian Aff. ¶ 3. This is sufficient foundation for her opinions concerning the Department's likely treatment of a referral of the plaintiff's claims from New Jersey to the Department.

None of the objections of the plaintiff to the Najarian affidavit have merit. The motion to strike it is denied.

II. The Motion for Summary Judgment

A. Applicable Legal Standard

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such

that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

B. Factual Background

The summary judgment record includes the following facts that are not in dispute.

The plaintiff and Paul Schieve were divorced in New Jersey in 1979. By 1991 Paul Schieve owed the plaintiff an unspecified amount of alimony that had not been paid in accordance with the divorce judgment. Deposition of Ursula C. Schieve ("Plaintiff's Dep.") at 30, 46; Affidavit of Ursula Schieve in Support of Opposition to Motion for Summary Judgment ("Plaintiff's Aff.) (Docket No. 17), ¶¶ 6, 8. The plaintiff contacted defendant Childs and asked him to assist her in causing Paul Schieve, who apparently resided in Maine at the time, to resume making court-ordered alimony payments. Plaintiff's Dep. at 46-47.

After the failure to make payments recurred, Childs filed an action in the Maine District Court on behalf of the plaintiff in 1995. Deposition of Dana W. Childs, Esq. ("Defendant's Dep.") at 19. Counsel for Paul Schieve filed a response in which he sought to revise his alimony obligation and to amend the divorce judgment in other ways. Childs filed a motion for leave to withdraw as the plaintiff's counsel on July 10, 1995 because the plaintiff had not paid him beyond a small retainer and a partial payment made by a check that was returned for insufficient funds. Counsel for Paul Schieve did not oppose the motion to withdraw. The action was set for hearing on July 27-29, 1995. Childs did not appear at the hearing, the court denied his motion to withdraw, Transcript, *Schieve v. Schieve,* Docket No. 95-DV-31, Maine District Court, Sixth District, Division of Lincoln ("Hearing Tr.") (Exh. 1 to Plaintiff's Opposition to Motion for Summary Judgment ("Plaintiff's Opposition") (Docket No. 16)), at 3-4, and testimony was taken from Paul Schieve. The court directed counsel for Paul Schieve to draft an order reducing his alimony obligation to one dollar per year, imposing counsel fees on the plaintiff, finding the plaintiff in contempt, imposing sanctions of approximately $58,000 on the plaintiff, and terminating Paul Schieve's obligation to provide health insurance for the plaintiff. Such an order was never signed or issued by the court.

On November 8, 1995 the state district court judge who had presided at the July 27 hearing granted Childs' motion to withdraw, reopened the hearing and allowed the plaintiff to present evidence at a future date, after obtaining new counsel. In March 1996 the same judge granted the plaintiff's motion to dismiss the state court action and ordered the plaintiff to pay Paul Schieve $5,000 in attorney fees.[1] Plaintiff's Dep. at 87-88; Plaintiff's Aff. ¶ 20.

[1] Unless otherwise noted by a specific citation to the summary judgment record, none of these facts are presented by either party in the statement of material facts required by this court's Local (continued...)

The plaintiff filed this action, alleging two counts of legal malpractice, on June 11, 1998. Docket.

C. Discussion

1. Jurisdictional Amount. I will address first the defendants' argument that the plaintiff cannot satisfy the requirement of 28 U.S.C. § 1332(a) that the amount in controversy be at least $75,000 when the basis for jurisdiction is diversity of citizenship because that argument concerns the court's jurisdiction. If the defendants are correct, this action must be dismissed. *Engel v. Trustees of Berwick Acad.*, 807 F. Supp. 9, 11 (D. Me. 1992).

A claim may be dismissed for failure to meet the jurisdictional minimum "only if it appears to a legal certainty that the claim is really for less than the jurisdictional amount." *Duchesne v. American Airlines, Inc.*, 758 F.2d 27, 28 (1st Cir. 1985) (quoting *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938); internal quotation marks omitted). If a jurisdictional allegation is challenged, "the party seeking to invoke jurisdiction has the burden of alleging with sufficient particularity facts indicating that it is not a legal certainty that the claim involves less than the jurisdictional amount." *Department of Recreation & Sports of Puerto Rico v. World Boxing Ass'n,*

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[1](...continued)
Rule 56. Some are included in allegations made in the amended complaint, but each such allegation is denied in the answer. Since all of the parties' assertions in their respective statements of material fact depend upon these essential facts, which do not appear to be disputed, the court will assume that these facts exist in order to reach the issues raised by the motion for summary judgment. Counsel are admonished, however, that the statements of material fact submitted in this case are not in compliance with the local rule and do not serve the court as the local rule intends. In the future, submission of such deficient statements may well result in denial of the motion which they are intended to support. The court cannot be expected to do counsel's work for them. Citations to the complaint as support for a factual allegation included in a statement of material fact, *e.g.*, Plaintiff's Statement of Facts in Dispute, etc. (Docket No. 18) ¶¶ 3 & 12, are also insufficient.

942 F.2d 84, 88 (1st Cir. 1991). The problem in a case involving a claim for pain and suffering or emotional distress "is that it is very difficult to be legally certain that the jurisdictional limit is not met." *Duchesne*, 758 F.2d at 28.

In her opposition to the motion on this point, the plaintiff relies solely on her alleged emotional distress to meet the jurisdictional threshold. Plaintiff's Opposition at 3-8. Although it seems unlikely that the distress she describes will generate damages in excess of $75,000, that is not the test. *Duchesne*, 758 F.2d at 29 ("while it seems unlikely that she will recover so much, we cannot say that it is legally certain"). Viewing the plaintiff's evidence in the light most favorable to her, as the court is required to do at this point, *Coventry Sewage Assoc. v. Dworkin Realty Co.*, 71 F.3d 1, 6 (1st Cir. 1995), I conclude that the defendants are not entitled to dismissal on this basis. *Cf. Engel*, 807 F. Supp. at 10-11 (order barring plaintiffs, as sanction for discovery violation, from presenting testimony of witnesses offered to show proximate cause, when special damages are only $1,681.61, means that plaintiffs cannot show that their claim exceeds jurisdictional minimum).

2. Count II. In the second count of the amended complaint, the plaintiff alleges that the defendants are liable for damages caused by their filing in the Maine courts of a motion to enforce the New Jersey divorce judgment which

> exposed the Plaintiff and the New Jersey divorce judgment to the jurisdiction of Maine Court and to Paul Schieve's modification motion which would otherwise would [sic] not have been available to him if Defendants had filed an action under the Uniform Reciprocal Enforcement Support Act (URESA).

Amended Complaint ¶ 50. The only other substantive paragraph in Count II that is distinct from the allegations made in Count I alleges that the defendants, by filing a motion to enforce the New Jersey judgment, "exposed the Plaintiff to Paul Schieve's contempt motion, which would have been

unavailable to Paul Schieve had Defendants filed her action under URESA." *Id.* ¶ 51.

The defendants argue that the version of URESA in effect at the time Childs filed the motion at issue would in fact have given Maine courts the power to modify a support order issued as a result of a divorce proceeding in another state, citing *Donn-Griffin v. Donn*, 615 A.2d 253, 255 (Me. 1992), and the statute in effect at the relevant time, 19 M.R.S.A. §§ 413-18.[2] They also point out that neither of the plaintiff's designated expert witnesses claims that Childs should have filed a URESA claim and argue that URESA in any event was not available for actions other than those brought by the Maine Department of Human Services, the Maine Attorney General, or a Maine district attorney. Defendants' Motion for Summary Judgment ("Defendants' Motion") (Docket No. 9) at 5-7. The plaintiff responds that Count II is not limited to a claim that the defendants should have brought a URESA action, but rather alleges that "[t]he whole premise of Plaintiff's Count II is that Defendants failed to advise Plaintiff of the dangers of the action which they undertook on her behalf." Plaintiff's Opposition at 10. Apparently, the plaintiff means to suggest, although she certainly never says so, even in the affidavit submitted in support of her opposition to the motion for summary judgment, that she would have told Childs not to file any motion or action in the Maine courts to enforce the New Jersey judgment if he had told her that "such action [would] expose[] the entirety of her claims to the jurisdiction of the Maine courts." *Id.*

Count II of the amended complaint simply cannot be read as broadly as the plaintiff contends. It is quite clearly a claim that the defendants should have brought a URESA action on the plaintiff's behalf. URESA, as then in effect in Maine, provided that upon registration of a foreign support

[2]All statutory citations in this section of my recommended decision, unless otherwise noted, are to sections of URESA repealed effective July 1, 1995 by 1993 Me. Laws, c. 690.

order, a term that included an order to pay alimony, 19 M.R.S.A. § 332(2), (5) & (9), "the district attorney shall proceed diligently to enforce the order," 19 M.R.S.A. § 417.

> Upon registration the registered support order shall be treated in the same manner as a support order issued by a court of this State. It has the same effect and is subject to the same procedures, defenses and proceedings for reopening, vacating or staying as a support order of this State and may be enforced and satisfied in like manner.

19 M.R.S.A. § 418. Thus, even if the defendants had registered the New Jersey alimony order with the Maine courts instead of bringing a motion to enforce that judgment, the Maine courts could have modified the alimony order. *Donn-Griffin*, 615 A.2d at 254-55 (Maine court has authority to modify support order entered by another state after it is registered pursuant to URESA; defendant filed objection asking court to amend foreign judgment to change primary residence of minor children, order plaintiff to pay child support, expenses and attorney fees). Accordingly, the defendants' failure to invoke URESA[3] could not have been the cause of the injuries alleged by the amended complaint in Count II and the defendants are therefore entitled to summary judgment on this count.

3. Count I. With respect to this count, the defendants argue that the plaintiff cannot show that any alleged conduct or failure to act by the defendants was the proximate cause of any damage to her. Defendants' Motion at 10-14. Count I of the amended complaint alleges negligence and legal malpractice consisting of breach of contract, ¶ 37, breach of a common law duty to use "such skill,

[3] While the repealed URESA statutes clearly contemplate that the enforcement action will be handled by the district attorney or the attorney general, 19 M.R.S.A. §§ 416-17, it is equally clear that privately retained counsel have also handled such proceedings, *see, e.g., Donn-Griffin*, 615 A.2d at 254. The Law Court has expressly sanctioned private use of URESA. *Gray v. Messier*, 602 A.2d 1155, 1156 (Me. 1992) ("We conclude that URESA procedures are ordinarily available to private parties . . . and that these procedures are separate from and additional to other remedies for enforcement of support obligations"). There are no reported cases in Maine in which URESA was used to enforce alimony rather than child support obligations.

prudence and diligence as lawyers of ordinary skill and capacity commonly possessed and exercised in the performance of such duties," ¶ 36, breach of specific sections of the Maine Code of Professional Responsibility applicable to lawyers, ¶ 43, and breach of unspecified orders of the Maine Supreme Judicial Court, ¶ 42. The specific mechanisms of these breaches alleged in the amended complaint are the failure to inform the plaintiff of the July 27, 1995 hearing, the filing of an inadequate motion for leave to withdraw as her counsel, and the failure to attend the July 27, 1995 hearing. *Id*. ¶¶ 38-42.[4]

Assuming *arguendo* that these specific actions or failures to act by the defendants were negligent, as they surely appear to be, Maine law requires the plaintiff to carry an additional evidentiary burden in order to bring her legal malpractice claim to trial. In an action alleging attorney malpractice,

> the plaintiff must establish that the defendant had a duty to the plaintiff to conform to a certain standard of conduct and that a breach of that duty proximately caused injury to the plaintiff. . . . [M]ore than a mere possibility that [the defendant attorney's] negligence, if any, might have caused [the plaintiff's] loss of the . . . action is necessary to establish that [the] conduct was the proximate cause of [the plaintiff's] loss.

Steeves v. Bernstein, Shur, Sawyer & Nelson, P.C., 718 A.2d 186, 190 (Me. 1998) (citations and internal quotation marks omitted; brackets in original).

> In an action following an attorney error during trial, the court addressing the causation issue in the subsequent malpractice action "merely retries, or tries for the first time, the client's cause of action which the client asserts was

[4] The defendants' assertion that the special damages alleged in the amended complaint are alleged only in connection with Count II because they appear in paragraphs 52 and 53, following Count II and without a separate heading, Defendant's Motion at 11, reads the amended complaint too narrowly for purposes of summary judgment. Those paragraphs allege, in general terms, that certain damages resulted from the defendants' negligence and malpractice, words that may reasonably be interpreted to encompass the allegations in Count I as well as those in Count II.

lost or compromised by the attorney's negligence."

Id. at 190-91 (quoting *Daugert v. Pappas*, 704 P.2d 600, 603 (Wash. 1985)).

The plaintiff contends that "all Plaintiff needs to show is that she would have been successful in enforcing the New Jersey order requiring Mr. Schieve to pay alimony to her in an action brought in Maine." Plaintiff's Opposition at 8. She relies on the opinion of one of her experts, Matthew F. Dyer, Esq., to support this assertion. *Id*. However, this opinion is not applicable to the allegations in Count I of the amended complaint. Mr. Dyer's opinion letter does not address the failures of the defendants to inform the plaintiff of the date of the hearing on the motion that they filed on her behalf or their failure to appear at that hearing. Letter dated May 28, 1998 from Matthew F. Dyer, Esq., to Thomas S. Carey, Esq., attached to Plaintiff's Designation of Experts, filed with Defendants' Statement of Undisputed Facts ("Defendants' SMF") (Docket No. 10), at 2. Even as to Count II, Dyer's letter would not be sufficient to meet the plaintiff's burden on summary judgment because it concludes only that the defendants should have filed an action under the Uniform Enforcement of Final Judgments Act, found at 14 M.R.S.A. § 8001 *et seq*. *Id*. at 5. Dyer relies on case law from Nebraska and Minnesota to conclude that such an action filed in Maine would not open the New Jersey divorce judgment to modification. *Id*. at 4-5. More important for present purposes is Dyer's statement that in order to invoke this Act, the plaintiff would have had to acquire from the New Jersey court a final money judgment for the amounts allegedly due her from Paul Schieve, and that the most recent order issued by that court had used this sum as a set-off against the amount due to Paul Schieve from the order to sell the property in which the plaintiff resided, and "was not a money judgment as such." *Id*. at 3. The plaintiff has made no showing here that such a judgment was

available to her from the New Jersey courts, and indeed the use of such a judgment, which by its nature would be for past alimony remaining unpaid, would be inconsistent with her protestations in this proceeding that she only sought to have the defendants obtain a Maine court order requiring Paul Schieve to resume regular payments, rather than collecting arrearages. Plaintiff's Aff. ¶¶ 13-14; Plaintiff's Opposition at 8. *See also* Plaintiff's Aff. ¶¶ 2-11 (New Jersey court's 1998 order continues the offset requirement). The Dyer opinion would be insufficient to avoid the entry of summary judgment on Count II even if the amended complaint could have been construed to include an allegation that included Dyer's theory of appropriate action by the defendants.

Accepting the plaintiff's characterization of her burden of proof as to Count I, she has not submitted evidence that, if credited by a jury, would establish that she would have obtained an order from the Maine District Court that Paul Schieve resume alimony payments to her if only she had been informed of the hearing, the defendants had filed an adequate motion to withdraw and/or the defendants had appeared at the hearing, the allegations that are the gravamen of Count I. As discussed above, the proceeding already initiated at that point before the Maine court allowed Paul Schieve to seek modification of his alimony obligation under the New Jersey judgment, as he did. It is not at all clear from this record that the Maine court would have denied all of Paul Schieve's requests and granted only that of the plaintiff if she and her counsel of record had been present at the hearing. It is at least equally as likely that the Maine court would have found the plaintiff in contempt for failure to sell the property in which she resided as required by the New Jersey court's orders, Hearing Tr. at 5-6, 12-13, 17, 26-27; Plaintiff's Dep. at 7, 34, or would have offset any alimony obligations on the part of Paul Schieve against his share in the value of that property, as the New Jersey court has done on more than one occasion, Plaintiff's Dep. at 10-12, 31-32.

Thus, while the summary judgment record contains some evidence of negligence by the defendants with respect to the allegations in Count I[5] and even some evidence of resulting damages,[6] evidence of proximate causation is lacking. "[S]ummary judgment in favor of the defendant is appropriate when the link between the attorney's act or omission and the alleged damage is overly speculative." *Steeves*, 718 A.2d at 190 (a "mere possibility" of success is insufficient to establish legal malpractice).

III. Conclusion

For the foregoing reasons, I **DENY** the plaintiff's motion to strike the affidavit of Mary Najarian and recommend that the defendants' motion for summary judgment be **GRANTED**.

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[5] James E. Kaplan, Esq., designated by the plaintiff as an expert witness, opined that "[t]he failures to advise [the plaintiff] of the hearing and to attend the hearing on her behalf clearly do not satisfy even the most minimal degree of care, skill, and dispatch required of lawyers" and that defendant Childs "breached the applicable duty of care owing to [the plaintiff] and engaged in actionable legal malpractice (assuming the existence of damages and injury)." Letter from James E. Kaplan, Esq. to Thomas S. Carey, Esq., dated March 20, 1997 (attached to Plaintiff's Designation of Experts, attached to Defendants' SMF), at 4, 5.

[6] While none of the elements of the Maine District Court's proposed order discussed at the end of the July 27, 1995 hearing actually ever went into effect, Plaintiff's Dep. at 74-76; the plaintiff was ultimately able to withdraw her motion from the Maine courts altogether, *id*. at 84-86; any costs incurred by the plaintiff for travel to Maine for the hearing that would have taken place in March 1996 if she had been unable to withdraw her motion to enforce the New Jersey judgment would have been incurred had she been informed of the July 27, 1995 hearing; and the defendants undertook to relieve the plaintiff of the consequences of their failure to appear at the July 27, 1995 hearing at no charge to her, Deposition of Dana W. Childs, Esq., at 81, 89-91, 96-98, the plaintiff has alleged emotional distress resulting solely from the failures of the defendants alleged in Count I of the amended complaint and supported that allegation with her testimony, Plaintiff's Dep. at 38, 80, 93-96, Plaintiff's Aff. ¶¶ 17-18. The plaintiff's claims for damages for fees paid to a second Maine attorney and for the attorney fees she has been ordered by the Maine District Court to pay to Paul Schieve's counsel are attributable to the claims raised in Count II of the amended complaint, not Count I.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 30th day of December, 1998.

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David M. Cohen
United States Magistrate Judge